IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

COMMODITY FUTURES TRADING COMMISSION, *et al*., Plaintiffs, v. TMTE, INC. a/k/a METALS.COM, *et al*., Defendants, and TOWER EQUITY, LLC, Relief Defendant.	Case No. **3:20-CV-02910-X**

PLAINTIFFS' RESPONSE TO DEFENDANTS LUCAS ASHER AND SIMON BATASHVILI'S OBJECTION TO THE DISCOVERY ORDER OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to Fed. R. Civ. P. 72(a), Plaintiffs' Commodity Futures Trading Commission and the States ("Plaintiffs") respectfully submit this response to Defendants Lucas Asher and Simon Batashvili's (collectively, the "Individual Defendants") Objection to the Magistrate Judge's Order dated January 8, 2025 ("Jan. 8, 2025 Order," ECF No. 842). *See* Individual Defs.' Objection (ECF No. 846). The Objection[1] fails to cite to any mistake of law or fact by the Magistrate Judge, or offer any valid reason why the January 8, 2025 Order should be rejected by

[1] The Individual Defendants' Objection concerns the "first five categories" of materials as delineated by the Magistrate Judge. *See* Jan. 8, 2025 Order at 8 (ECF No. 842) (defining Category 1 as "Customer Interview Audio Recordings," Category 2 as "Notes or Transcripts of Customer Interviews," Category 3 as "Customer Voicemails," Category 4 as "Customer Questionnaires," and Category 5 as "Email Communications Between Plaintiffs and Customers").

the Court as clearly erroneous or contrary to the law as required by Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1)(A). Instead, the Individual Defendants seek a second bite at the apple by rehashing their original unsuccessful arguments from their Motion to Compel. Their scattershot objections and claimed errors are mere disagreements with the Magistrate Judge's findings and in no way meet the clearly erroneous or contrary to law standard. Given the vast deference and discretion accorded to magistrate judges in resolving pre-trial discovery disputes such as this one, Plaintiffs respectfully request that the Court deny the Individual Defendants' Objection and adopt Magistrate Judge Toliver's Order in its entirety.

I. BACKGROUND

After considering the Individual Defendants' Motion to Compel (ECF No. 707) and Plaintiffs' Motion to Quash or for a Protective Order (ECF No. 723), including an *in camera* review of the materials Plaintiffs claimed to be protected as privileged,[2] Magistrate Judge Toliver denied the Individual Defendants' Motion to Compel solely on the basis of the work product doctrine. *See* Jan. 8, 2025 Order at 7, n.3 (ECF No. 842).[3] Specifically, the Magistrate Judge found that: (1) "the information sought for discovery in all eleven categories was prepared in anticipation of litigation" (*see id.* at 9-10); (2) the materials sought are protected as opinion work product (*see id.* at 10-13); and (3) the Individual Defendants failed to demonstrate a

[2] As described in the January 8, 2025 Order, "the Court ordered Plaintiffs to submit by November 13, 2024, for *in camera* review, the materials they claimed to be protected as privileged, and Plaintiffs timely did so." Jan. 8, 2025 Order at 3-4 (ECF No. 842). *See also* Electronic Order dated Nov. 13, 2024 (ECF No. 815); Plaintiffs' Notice of Manual Filing for *In Camera* Review (ECF No. 832).

[3] The January 8, 2025 Order states, in relevant part: "It is unclear to the Court which documents Individual Defendants claim are being withheld on the basis of attorney-client privilege. . . . Thus, the Court does not reach the question of whether specific documents are protected by the attorney-client privilege claims and denies Individual Defendants' motion to compel solely on the basis of the work product doctrine."

"compelling need" for opinion work product materials, or even a "substantial need for the materials" and "undue hardship" in obtaining the materials' substantial equivalent assuming arguendo the materials are ordinary work product (*see id.* at 14-17).

With respect to the Magistrate Judge's last finding concerning the Individual Defendants' substantial need for the materials, the Court found one narrow exception where Plaintiffs had communications with victims who are now deceased. *See id.* at 16-17 (concluding "Plaintiffs must produce communications with the deceased victims, if any, to the extent that those materials include factual information," and permitting redactions of "privileged opinion work product where appropriate"). Accordingly, the Magistrate Judge ordered Plaintiffs "to produce any existing communications with deceased alleged victims that are responsive to the discovery requests." Pursuant to the Order, on January 22, 2025, Plaintiffs provided a supplemental and timely production of 141 documents comprising 435 pages of materials related to deceased victims.[4]

II. ARGUMENT

A. The Proper Standard Of Review Is Clearly Erroneous Or Contrary To Law

The Individual Defendants' Objection concerns the Magistrate Judge's January 8, 2025 Order on their Motion to Compel, which is a non-dispositive discovery motion.[5] *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995) (considering pre-trial discovery motions to be non-dispositive). Thus, the Objection is reviewed under a "clearly erroneous or is contrary to law"

[4] Plaintiffs' production is subject to and does not waive the work product objections previously detailed in Plaintiffs' Responses to the Individual Defendants' First Requests for Production.

[5] The Court's Order of Reference dated June 5, 2024 referred the Individual Defendants' Motion to Compel to the Magistrate Judge "for hearing (if necessary) and determination." Order of Reference (ECF No. 709).

standard pursuant to Fed. R. Civ. P. 72(a). *See also* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); *Castillo v. Frank*, 70 F.3d at 385 (stating that 28 U.S.C. § 636(b)(1)(A) "specifically requires" the district court to apply the clearly erroneous standard when reviewing a magistrate judge's ruling on non-dispositive, pretrial motions such as a discovery motion).

This is a "highly deferential standard," requiring the district court "to affirm the decision of the magistrate judge unless 'on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.'" *Gomez v. Ford Motor Co*., No. 5:15-cv-866, 2017 WL 5201797, at *2 (W.D. Tex. Apr. 27, 2017) (quoting *United States v. United States Gypsum Co*., 333 U.S. 364, 395 (1948)). The clearly erroneous or contrary to law standard "does not entitle the court to reverse or reconsider the order simply because it would or could decide the matter differently." *Gomez v. Ford Motor Co*., 2017 WL 5201797, at *2 (citing *Guzman v. Hacienda Records & Recording Studio, Inc*., 808 F.3d 1031, 1036 (5th Cir. 2015)). "In other words, even were the Court disposed to differ with the Magistrate . . . such a difference of opinion would not alone entitle it to reverse or reconsider the [order]." *McLane Co., Inc., v. ASG Tech. Group, Inc*., No. 6:17-cv-166, 2019 WL 609767, at *1 (W.D. Tex. Jan. 15, 2019) (affirming magistrate's discovery order because there was no clear error).

B. The Individual Defendants Fail To Provide Any Basis For A Determination That The Magistrate's Order Was Clearly Erroneous Or Contrary To Law

Rule 72(b)(2) of the Federal Rules of Civil Procedure requires that a party's objections to a magistrate's order must be "specific." Objections to a magistrate judge's order are not meant to be a vehicle to "simply rehash or mirror" arguments already considered by the magistrate. *See Gray v. Winco Foods, LLC*, 683 F. Supp. 3d 571, 582 (E.D. Tex. 2023) (collecting cases). Here,

the Individual Defendants fail to offer any errors of law but repeat the same arguments presented in their initial motion and otherwise offer conclusory or general objections, including that: (1) the first five categories of material requested by the Individual Defendants are "simply not protected by any privilege—including the work product privilege" (*see* Individual Defs.' Objection at 3 (ECF No. 846)); (2) "[s]tatements by customers—whether they be interviews, recordings, emails, or the like—are not work product because they do not contain 'mental impressions, conclusions, opinions or legal theories of an attorney'" (*see id.* at 5); and (3) the Order's finding that the "customer questionnaires and interviews are opinion work product, rather than fact work product, is clearly erroneous" (*see id.* at 6).

However, as set forth in her carefully reasoned opinion, each of these arguments was already considered and firmly rejected by the Magistrate Judge following an *in camera* review:

> **In camera review of these materials reveals that the information included in handwritten or typed interview notes and memoranda prepared after the interviews contain summaries of customer and witness interviews conducted by attorneys and investigators, their mental impressions and legal conclusions included therein. Doc 832; *Brady*, 238 F.R.D. at 442. The questions that investigators posed to customers during the interviews—included in interview audio recordings, questionnaires sent to and received from the customers, and notes and summaries of such interviews—'were specifically selected and compiled by a party or its representative in preparation for litigation[.]' Doc. 832; *Brady*, 238 F.R.D. at 442 (citing *Peterson*, 967 F.3d at 1189). As materials and inquiries specifically chosen by attorneys and investigators, these selections reveal mental impressions regarding the litigation *sub judice*. *Brady*, 238 F.R.D. at 442 (citing *Peterson*, 967 F.2d at 1189). Even communications with customers simply to provide case updates or to schedule future conversations, depositions, or declarations were sprinkled with attorneys' and investigators' mental impressions regarding the case. *Id.*; Doc. 832.**

Jan. 8, 2025 Order at 12-13 (ECF No. 842) (emphasis added). This explanation shows that the Magistrate Judge properly considered the facts and each category of information and concluded that the materials sought are protected as opinion work product. The Magistrate explicitly

rejected the Individual Defendants' assertion that "they seek only factual information"[6] and found that the materials sought are opinion work product—not ordinary work product. *See* Jan. 8, 2025 Order at 9-11 (ECF No. 842). The Individual Defendants fail to show that Magistrate Toliver's Order was wrongly decided, much less clearly erroneous or contrary to law. Mere disagreement with the Magistrate's Order is not a basis to object and is wholly insufficient to satisfy the clearly erroneous standard. *See Jazz Pharms., Inc. v. Roxane Lab'ys, Inc.*, No. 2:10-cv-6108, 2013 WL 785067, at *4 (D.N.J. Feb. 28, 2013) ("In short, mere disagreement with the judicial finding of a Magistrate Judge does not meet the 'clear error' standard required for reversal."); *Doe #11 v. Lee*, No. 3:22-cv-338, 2023 WL 1929996, at *2 (M.D. Tenn. Feb. 10, 2023) (same); *Vista Partners, Inc. v. Brainscope Co., Inc.*, No. 1:19-cv-138, 2019 WL 3543625, at *3 (D. Colo. Aug. 5, 2019) (same).

In addition, the Individual Defendants continue to conflate the issues of substantial need and undue hardship, which the Magistrate Judge has already considered and ruled upon. The Order explains: "Even assuming Plaintiffs in camera production materials are ordinary work product—not opinion—***Individual Defendants have not made a sufficient showing that they have a substantial need for the materials and would face undue hardship to obtain the materials' substantial equivalent***." *Id.* at 15 (emphasis added). As to substantial need, Magistrate Toliver considered the Individual Defendants' assertions that "neither depositions nor

[6] Although the Individual Defendants contend throughout their Objection that they are seeking only "verbatim witness statements," it appears they are attempting to move the target with such a disingenuous claim. Indeed, Plaintiffs submitted forty-nine sworn declarations by numerous state investors with their Motion for Partial Summary Judgment. *See* Pls.' Exhibits 1-48, 73 (ECF Nos. 776-1 to 776-5, 776-8). Despite the availability of these sworn witness declarations containing the "factual information" allegedly sought by the Individual Defendants, the Individual Defendants moved to strike such evidence. *See* Individual Defs.' Mot. to Strike Summary Judgment Evidence at 6-11 (ECF No. 788).

written discovery could reproduce a substantial equivalent to the information requested" and found that "Individual Defendants present no evidence that they would be unable to ascertain the material facts through methods such as depositions." *Id.* at 15-16.[7] As to undue hardship, Magistrate Toliver considered the Individual Defendants' arguments regarding their lack of "financial or legal resources to recreate the government's expansive investigation" and concluded that the Individual Defendants present no evidence "of their lack of financial and legal resources." *Id.* The Objection similarly fails to offer any concrete evidence and speculates that taking "dozens—or perhaps more than a hundred—depositions" constitutes an "unusual expense." *Id.* at 6. In summary, the Individual Defendants' conclusory arguments concerning substantial need and undue hardship do not establish that the Magistrate Judge's ruling on these issues was clearly erroneous.

C. The Individual Defendants' Other Complaints Are Without Merit

The Individual Defendants repeat their argument that they "are entitled to know what the customers said at the time"[8] and attach two emails produced by Plaintiff State of Alaska on January 16, 2025.[9] *See* Individual Defs.' Objection at 7 n.7 (ECF Nos. 846, 846-1). The two

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[7] Contrary to the Individual Defendants' assertions, the cases cited in the Order support the Magistrate Judge's finding of the Individual Defendants' failure to show substantial need. *See SEC v. Brady*, 238 F.R.D. 429, 443-44 (N.D. Tex. 2006) (denying defendant's motion to compel where defendant failed to argue compelling need and alternatively could not make lesser showing of undue hardship and substantial need; specifically, that "the facts and information that [defendant] seeks are not exclusively available in the documents he seeks"); *In re Int'l Sys. and Controls Corp. Sec. Litig.,* 693 F.2d 1235, 1241 (5th Cir. 1982) (vacating order of production and remanding for court to determine if information "can be discovered without the work product—i.e., by deposition testimony" or through other means).

[8] *Compare* Individual Defs.' Mot. to Compel at 9 (ECF No. 707), *with* Individual Defs.' Objection at 7 (ECF No. 846).

[9] Contrary to the Individual Defendants' assertions, these emails were not produced in response to Magistrate Judge Toliver's Order. The State of Alaska produced these emails on January 16,

emails from March 2020 were sent from a State of Alaska investigator to a customer and concern the customer's draft affidavit. The Individual Defendants complain that the emails show that Plaintiffs "instructed" customers to include certain language in their sworn statements. *See id.* In fact, the March 2020 emails reflect just the opposite—a process whereby the state investigator worked diligently with the customer through multiple drafts to ensure the final declaration was accurate, comprehensive, and clearly communicated the customer's story before it was fully adopted by the customer upon execution. Nor do the Individual Defendants even attempt to explain why they could not have explored the bases for customer declarations through depositions. *See* Individual Defs.' Objection at 7 n.7 (ECF No. 846) (arguing they have "no way of tracing (***absent separate depositions***) how much of any witnesses' statements they wrote versus the state investigators") (emphasis added). The Individual Defendants' choice to forego conducting discovery is not a basis to override Plaintiffs' valid work product assertions.

To the extent the Individual Defendants are still seeking Plaintiff attorneys' or investigators' draft customer statements and related communications with customers, the Magistrate Judge agreed with Plaintiffs that such material is clearly protected as opinion work product and granted Plaintiffs' motion to quash Request No. 15 of the Individual Defendants' subpoenas *duces tecum* to customer victims. *See* Jan. 8, 2025 Order at 18-19 (ECF No. 842). Such material constitutes classic work product. *See, e.g.*, *Booth v. Galveston Cnty.,* No. 3:18-cv-104, 2018 WL 5276265, at *4 (S.D. Tex. Oct. 10, 2018) ("[T]he overwhelming majority of courts recognize that draft declarations, the evolution of those declarations, and communications between witnesses are protected by the work-product doctrine."); *Mitura v. Finco Servs., Inc.*,

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2025, after discovering that a prior production in September 2024 was mistakenly never transmitted. These emails were never withheld as work product, were not included on the State of Alaska's privilege log, and do not involve a deceased investor.

347 F.R.D. 299, 301 (S.D.N.Y. 2024) (finding drafts of declaration and other communications exchanged between former employees' counsel and non-party witness constituted attorney work product, and thus was not subject to disclosure). The Individual Defendants' disagreement with the Magistrate's finding on this issue does not constitute clear error.

Finally, the Objection attempts to advance a frivolous, unsupported argument concerning Plaintiff's alleged waiver of the attorney-client privilege. The Individual Defendants contend that "to the extent privileged information was shared during these communications [Categories 1-5] with customers *this would operate as a waiver of the privilege*." Individual Defs.' Objection at 3 (emphasis in original). In support of this waiver argument, they cite to a case regarding waiver of attorney-client privilege, *Nguyen v. Excel Corp*., 197 F.3d 200, 207 (5th Cir. 1999) (finding that a corporate defendant waived its attorney-client privilege through an attorney's selective disclosure of attorney-client communications during deposition testimony). As Magistrate Toliver based her Order on the work product doctrine, the Individual Defendants are ignoring the basis for her decision. *See* Jan. 8, 2025 Order at 7, n.3 (ECF No. 842). Moreover, the Individual Defendants themselves waived this argument by failing to raise it before their Objection. *See Guilbeau v. Schlumberger Tech. Corp*., 719 F. Supp. 3d 702, 711 (W.D. Tex. 2024) ("A party who objects to a recommendation of a magistrate judge 'waives legal arguments not made in the first instance before the magistrate judge.'") (quoting *Freeman v. Cnty. of Bexar*, 142 F.3d 848, 851 (5th Cir. 1998)).

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court overrule the Individual Defendants' Objection (ECF No. 846) and affirm Magistrate Judge Toliver's January 8, 2025 Order in full.

Dated: February 12, 2025

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CERTIFICATE OF SERVICE

On February 12, 2025, I electronically filed the foregoing Plaintiffs' Response to the Individual Defendants' Objection to the Magistrate's Order Dated January 8, 2025, in the above-captioned matter using the CM/ECF system, and I am relying upon the transmission of the Clerk's Notice of Electronic Filing for service upon all parties in this litigation.

/s/ Danielle Karst
Danielle Karst